

## Fair Work Amendment (Better Work/Life Balance) Bill 2012

### Referral and conduct of the inquiry

- 1.1 On 16 February 2012, the Fair Work Amendment (Better Work/Life Balance) Bill 2012 (the Bill) was referred to the House of Representatives Standing Committee on Education and Employment (the Committee) by the House of Representatives Selection Committee.
- 1.2 The Bill was introduced in the House of Representatives on 13 February 2012 by the Member for Melbourne, who was subsequently appointed to the Committee for the purposes of this inquiry. The Bill had received a first reading in the House at the time of drafting this report. A copy of the Bill is provided at Appendix A.
- 1.3 The inquiry was advertised by media release and in *The Australian* as well as inviting submissions directly from stakeholders.
- 1.4 The Committee received 23 submissions, three exhibits and conducted one public hearing in Canberra. Lists of submissions and exhibits, and details of the hearing, are available at Appendices B, C and D respectively.

### Context of the inquiry

- 1.5 The Bill proposes to amend the *Fair Work Act 2009* to broaden the scope of flexible working arrangements provisions, strengthen the grounds for claims to flexibility from employees with caring responsibilities and

enable Fair Work Australia (FWA) to determine and enforce flexible working arrangements orders.

1.6 The Committee's consideration of the Bill occurred in an environment of significant review of flexible working arrangements. For instance, the Government has recently received the following reports that consider, among other matters, flexible working arrangements:

- the Productivity Commission's *Caring for Older Australians* released on 8 August 2011;<sup>1</sup>
- the Productivity Commission's *Disability Care and Support* released on 10 August 2011;<sup>2</sup>
- the Advisory Panel on the Economic Potential of Senior Australians' *Realising the economic potential of senior Australians – turning grey into gold*, released on 12 December 2011;<sup>3</sup> and
- the Australian Law Reform Commission's *Family Violence and Commonwealth Laws – Improving Legal Frameworks* released on 8 February 2012.<sup>4</sup>

1.7 Flexible working arrangements are also under active consideration by the following reviews that are scheduled to report back to government by the end of May:

- an independent review of the *Fair Work Act 2009*; and
- the Department of Education, Employment and Workplace Relations (DEEWR) consultation on expanding the right to request flexible working arrangements under the National Carer Recognition Framework.<sup>5</sup>

1.8 Additionally, the General Manager of Fair Work Australia (FWA) is currently conducting research into:

- the extent to which individual flexibility arrangements under modern awards and enterprise agreements are being agreed to, and the content of those arrangements, and

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1 Productivity Commission, *Caring for Older Australians*, Report No. 53, 28 June 2011, pp. 339-341.

2 Productivity Commission, *Disability Care and Support*, Report No. 54, Vol. 2, 31 July 2011, pp. 728-729.

3 Advisory Panel on the Economic Potential of Senior Australians, *Realising the economic potential of senior Australians – turning grey into gold*, 2011, p. 24.

4 Australian Law Reform Commission, *Family Violence and Commonwealth Laws – Improving Legal Frameworks*, Report No. 117, 8 February 2012, ch. 16.

5 Ms Jody Anderson, DEEWR, *Transcript of Evidence*, 23 March 2012, p. 34.

- the operation of the provisions of the National Employment Standards (NES) relating to employee requests.

1.9 This research is conducted under section 653 of the *Fair Work Act 2009* and required to be reported by 26 November 2012.<sup>6</sup>

## **Background—current provisions for flexible working arrangements**

1.10 Current provisions for flexible working arrangements are set out in the National Employment Standards (NES) at Part 2-2 of the *Fair Work Act*. Division 4 of this part provides for requests for flexible working arrangements and section 65 specifies employees who are eligible to make a request:

(1) An employee who is a parent, or has responsibility for the care, of a child may request the employer for a change in working arrangements to assist the employee to care for the child if the child:

- (a) is under school age; or
- (b) is under 18 and has a disability.

(2) The employee is not entitled to make the request unless:

(a) for an employee other than a casual employee – the employee has completed at least 12 months of continuous service with the employer immediately before making the request; or

(b) for a casual employee – the employee:

- (i) is a long term casual employee of the employer immediately before making the request; and
- (ii) has a reasonable expectation of continuing employment by the employer on a regular and systemic basis.<sup>7</sup>

1.11 Examples of the type of changes an employee is entitled to request include changes in hours of work, work patterns and location of work.

1.12 The remainder of section 65 requires that a request for flexible working arrangements must be in writing and set out the detail of and reasons for the change<sup>8</sup> and that the employer:

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<sup>6</sup> Ms Kristin Letts, DEEWR, *Transcript of Evidence*, 23 March 2012, p. 34.

<sup>7</sup> *Fair Work Act 2009*, s. 65 (1 & 2).

- must provide a written response within 21 days;<sup>9</sup>
  - may refuse a request only on reasonable business grounds;<sup>10</sup> and
  - must include details of the reasons for refusing a request in the response.<sup>11</sup>
- 1.13 Sections 144 and 202 of the Act also provide for individual flexibility arrangements (IFA) to meet 'genuine needs' of the employers and employees within awards and enterprise agreements. On entering an IFA the employer is required to ensure that the employee would be better off overall than they would have been had the IFA not been entered into.<sup>12</sup>

## Outline of the Bill

- 1.14 The Bill has one Schedule of 23 amendments to the *Fair Work Act 2009*. Item 8 repeals division 4 of part 2-2 of the *Act*. Some elements of division 4 are retained in item 12, which inserts a new part (Part 2-7A) with amended flexible working arrangements provisions.
- 1.15 Item 13 provides penalties for contravening a flexible working arrangements order (as determined in Part 2-7A).
- 1.16 Further, item 17 requires Fair Work Australia (FWA) to conduct research into the operation of Part 2-7A, particularly into requests for changed working arrangements.
- 1.17 The other proposed amendments are consequential amendments.

## Part 2-7A, Division 2—Flexible working arrangements

- 1.18 Part 2-7A proposes eligibility requirements for employees and processes for requesting changes to working arrangements. The Bill inserts Part 2-7A as a new section, so that the right to request flexible working arrangements would no longer be part of the NES.
- 1.19 Division 2 of part 2-7A comprises two clauses. Clause 306D proposes to extend the right to request flexible working arrangements from employees

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8 *Fair Work Act 2009*, s. 65(3).

9 *Fair Work Act 2009*, s. 65(4).

10 *Fair Work Act 2009*, s. 65(5).

11 *Fair Work Act 2009*, s. 65(6).

12 *Fair Work Act 2009*, ss. 144(4) & 203(4).

who are caring for children under certain circumstances to all employees and their representative organisations.

- 1.20 Clause 306E proposes to explicitly extend and strengthen the right to request flexible working arrangements for any employee who has responsibility for the care of another person.
- 1.21 The clause extends the right to request flexible working arrangements from employees caring for children in certain circumstances to employees who have responsibility for care of another person.
- 1.22 The right of carers to request flexible working arrangements is strengthened by requiring employers who refuse a request to show 'serious countervailing business grounds' that warrant the refusal. This test is higher than the 'reasonable business grounds' proposed to apply to all other requests.<sup>13</sup>
- 1.23 Otherwise, the eligibility of employees to request flexible work arrangements (in terms of required periods of service with an employer), the procedures by which the request and the employer's response are made are the same as those under the current Act.

### Part 2-7A, Division 3—Flexible working arrangements orders

- 1.24 Division 3 of Part 2-7A proposes to provide a power to Fair Work Australia to make enforceable orders 'to ensure that an employer complies with proposed section 306D or 306E.'<sup>14</sup>
- 1.25 Subclause 2 of clause 306F specifies that FWA may only receive applications for fair working arrangements orders from:
- (a) an employee or organisation whose request under subsection 306D(1) or 306E(1) for a change in working arrangements has been refused;
  - (b) an employee organisation that is entitled to represent an employee covered by paragraph (a);
  - (c) the Age Discrimination Commissioner, the Disability Discrimination Commissioner or the Sex Discrimination Commissioner.<sup>15</sup>
- 1.26 Flexible working arrangements orders may be implemented in stages (as provided in the order), as FWA deems appropriate.<sup>16</sup>

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13 Fair Work Amendment (Better Work/Life Balance) Bill 2012, c. 306E(5).

14 Fair Work Amendment (Better Work/Life Balance) Bill 2012, c. 306F(1).

15 Fair Work Amendment (Better Work/Life Balance) Bill 2012, c. 306F(2).

16 Fair Work Amendment (Better Work/Life Balance) Bill 2012, c. 306G.

- 1.27 Further, the Bill would make contravening a term of a flexible working arrangements order subject to a civil remedy provision.<sup>17</sup>
- 1.28 Division 3 also addresses the possibility of inconsistencies arising between flexible working arrangements orders and modern awards and enterprise agreements, in which event:
- (1) A term of a modern award has no effect in relation to an employee to the extent that it is less beneficial to the employee than a term of a flexible working arrangements order that applies to the employee.
  - (2) A term of a flexible working arrangements order has no effect in relation to an employee to the extent that it is inconsistent with a term of an enterprise agreement that applies to the employee.<sup>18</sup>

## Submitter concerns

- 1.29 Stakeholders expressed either strong support for or opposition to the proposed extension of the right to request flexible working arrangements and provide an enforcement mechanism.
- 1.30 Stakeholders who supported the proposal argued that it would help increase and maintain workforce participation and provide support to otherwise vulnerable employees with little bargaining power. They argued that the Bill would encourage employees not currently covered by a right to request, to seek changes to their working arrangements instead of withdrawing from the workforce when their circumstances might require these changes.
- 1.31 Some stakeholders who supported the proposed extension of flexible working arrangements argued that the Bill did not go far enough and called for the removal of required minimum periods of employment before requests could be made.<sup>19</sup>
- 1.32 Stakeholders who opposed the Bill, argued that proposing changes to flexible working arrangements was premature when the Government was currently considering its response to a number of reports and awaiting the

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17 Fair Work Amendment (Better Work/Life Balance) Bill 2012, c. 306H.

18 Fair Work Amendment (Better Work/Life Balance) Bill 2012, c. 306I.

19 For instance, Ms Anna Chapman, *Submission 3*, pp. 4-5; Women & Work Research Group, *Submission 8*, pp.6-7; Centre for Work + Life, *Submission 9*, p. 3; Job Watch, *Submission 10*, p. 8 and Work and Family Policy Roundtable, *Submission 11*, p. 4.

findings of further reviews on this matter.<sup>20</sup> In particular, stakeholders expressed reservations that the Bill pre-empted the comprehensive independent review of the *Fair Work Act* due to report to government by 31 May 2012.

- 1.33 Ai Group also suggested that the current flexible working arrangement provisions have proved sufficient with the vast proportion of flexible working arrangements being agreed directly between employers and employees.<sup>21</sup>
- 1.34 Apart from the broader debate relating to the desirability of extending the scope of the right to request flexible working arrangements, specific concerns with the Bill that emerged in evidence focused on the proposed:
- removal of flexible working arrangements from the NES;
  - introduction of enforceable flexible working arrangements orders; and
  - retention of certain eligibility requirements for the right to request flexible working arrangements.

## Removing flexible working arrangements provisions from the NES

- 1.35 The Bill proposes removing flexible working arrangements provisions from the NES and inserting amended provisions in the new Part 2-7A. The NES are minimum standards that were developed through extensive consultation with employer and employee organisations. Notably, as minimum standards, the NES cannot be overridden by an enterprise agreement.
- 1.36 Inserting flexible working arrangements provisions outside the NES would mean that they are no longer a minimum standard. A flexible working arrangements order could be made for an employee, but it would not be part of the NES and thus could be overridden by an enterprise agreement. The Ai Group described an arrangement whereby a collective agreement could override flexibility for individuals as 'counterintuitive'.<sup>22</sup>
- 1.37 The Department of Education, Employment and Workplace Relations (DEEWR) suggested that the proposed removal of flexible working arrangements from the NES could cause public confusion as the NES are

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20 For instance AFEL, *Submission 14*, p. 4; Business Council of Australia, *Submission 16*, p. 1; ACCI, *Submission 20*, p. 1 and APTIA, *Submission 21*, p. 2.

21 Mr John O'Callaghan, Ai Group, *Transcript of Evidence*, 23 March 2012, p. 2;

22 Ms Genevieve Vaccaro, Ai Group, *Transcript of Evidence*, 23 March 2012, p. 6.

‘broadly understood and were developed through extensive consultation.’<sup>23</sup>

- 1.38 Job Watch supported the maintenance of flexible working arrangements within the NES on the grounds that:

Since [the NES] is becoming a recognised set of minimums that smaller employers can become aware of and understand ... putting [flexible working arrangements] in a different section of the Act ... will be more complicated for smaller employers ... Even a set of employees or a union that is not the most sophisticated can point to the NES and say, “We need this in our enterprise agreement – full stop...”<sup>24</sup>

- 1.39 Some stakeholders appeared unaware that the Bill proposed to remove flexible working arrangements provisions from the NES.<sup>25</sup> Others expressed awareness of the proposal, but were uncertain as to the reason and what ramifications such a move might have.<sup>26</sup>
- 1.40 Of the nine organisations and one individual that appeared at the public hearing, which included employer, employee and carer organisations, all expressed outright opposition to or reservation at the proposed removal of flexible working arrangements from the NES.<sup>27</sup>
- 1.41 By contrast, a late submission received from the United Firefighters Union of Australia (UFUA) supported the Bill ‘in that it specifically provides that flexible arrangements cannot be inconsistent with a term of an enterprise agreement.’ UFUA argued that ‘individual circumstances must be balanced in the context of the workplace or industry.’<sup>28</sup>

23 DEEWR, *Submission 18*, p. 9.

24 Mr Ian Scott, Job Watch, *Transcript of Evidence*, 23 March 2012, p. 2.8

25 For example, Women & Work Research Group, *Submission 8*, p. 7; Work + Family Policy Roundtable, *Submission 11*, p. 1; ACTU, *Submission 12*, p. 3; AFEI, *Submission 14*, p. 2; Working Women’s Centre SA, *Submission 19*, pp. 1-2.

26 For example, Carers Australia, *Submission 15*, p. 2; Ms Belinda Tkalcevic, ACTU, *Transcript of Evidence*, 23 March 2012, p.8.

27 Mr Genevieve Vaccaro, Ai Group, *Transcript of Evidence*, 23 March 2012, p. 2; Ms Belinda Tkalcevic, ACTU, *Transcript of Evidence*, 23 March 2012, p. 8; Ms Mary Reid, Carers Australia, *Transcript of Evidence*, 23 March 2012, p. 16; Ms Anna Chapman, *Transcript of Evidence*, 23 March 2012, p. 22; Ms Alexandra Heron, Women and Work Research Group, *Transcript of Evidence*, 23 March 2012, p. 22; Ms Sara Charlesworth, Centre for Work+Life, *Transcript of Evidence*, 23 March 2012, p. 22; Mr Ian Scott, Job Watch, *Transcript of Evidence*, 23 March 2012, p. 28; Ms Sandra Dann, Working Women’s Centre SA, *Transcript of Evidence*, 23 March 2012, p. 28; Ms Anna Davis, Northern Territory Working Women’s Centre, *Transcript of Evidence*, 23 March 2012; Ms Jody Anderson, DEEWR, *Transcript of Evidence*, 23 March 2012, p. 35.

28 UFUA, *Submission 22*, p. 2.



- 1.42 The Committee notes the NES is a consolidated baseline of minimum employment standards, and so strongly disagrees with the proposed removal of flexible working arrangements provisions from the NES. The current facility that allows flexible working arrangements to operate within the framework of enterprise agreements does not unduly expose workplaces or industries to unacceptable outcomes because flexibility is based on a right to request and thus can be denied on reasonable business grounds.
- 1.43 DEEWR indicated that as Part 2-7A was outside the NES, it would rely on a different enforcement framework. The Department expressed concern that this might increase the workload of Fair Work Australia.<sup>29</sup> The proposed enforcement framework will be considered in greater detail in the next section.

### Flexible working arrangements orders

- 1.44 The Bill proposes to empower Fair Work Australia to make enforceable flexible working arrangements orders. Employee advocates generally supported the proposal for FWA to make flexible working arrangements orders.<sup>30</sup> Ms Anna Chapman typified support for flexible working arrangements orders:

At present the [Fair Work] Act rule that the only basis for an employer to refuse a request for flexibility is 'reasonable business grounds' is not enforceable as a contravention of Part 2-2 Division 4 of the ... Act. It cannot be litigated directly, as no cause of action arises where an employer refuses a request on wholly unreasonable grounds.<sup>31</sup>

- 1.45 Carers Australia expressed concern that 'trying to impose [orders] on employers simply invites resistance' and stated that it was hesitant about the compulsory aspect of the proposal because 'the very last thing we want to do is to give employers a reason for not employing carers.'<sup>32</sup>
- 1.46 Ms Chapman called this suggestion 'nonsensical' because 'the majority of employees are likely to be carers at some stage' and drew a parallel with

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29 DEEWR, *Submission 18*, p. 9.

30 Ms Anna Chapman, *Submission 3*, pp. 1-2. See also Workplace Research Centre, *Submission 7*, pp. 3-4; National Network of Working Women's Centres, *Submission 17*, pp. 3-4; Ms Belinda Tkalcevic, ACTU, *Transcript of Evidence*, 23 March 2012, p. 8.

31 Ms Anna Chapman, *Submission 3*, p. 1.

32 Ms Susan Taylor, Carers Australia, *Transcript of Evidence*, 23 March 2012, pp. 15-6.

arguments that the Sex Discrimination Act would result in discrimination against the employment of women.<sup>33</sup>

- 1.47 Carers Australia cautioned that caring requirements can be unpredictable and subject to change and warned that forcing a rigid process or an inflexible order onto employers and employees may not actually achieve flexibility.<sup>34</sup> The Ai Group echoed concerns that FWA orders were not easily altered or terminated.<sup>35</sup> Job Watch sought the insertion of additional clauses in the Bill to allow for revoking or varying an order.<sup>36</sup>
- 1.48 The Ai Group expressed in principle opposition to third-party arbitration suggesting that flexible working arrangements orders would be contrary to the purpose of the *Fair Work Act* in replacing a framework that has facilitated bargaining and cooperation with a move to a more adversarial system with resolution by arbitration.<sup>37</sup>
- 1.49 The power to impose flexible working arrangements orders appears to be at odds with one of the objects of the *Fair Work Act*; namely to support:
- a system that has at its heart bargaining in good faith at the enterprise level, as this is essential to maximise workplace cooperation, improve productivity and create rising national prosperity...<sup>38</sup>
- 1.50 The proposal moves away from the principle of encouraging dialogue between employees and employers so that a mutually agreeable arrangement can be struck. The principle underlying a right to request flexible working arrangements and requirement to respond is the facilitation of a better understanding by each party of the requirements of the other.

## Retention of eligibility requirements for requests

- 1.51 Clauses 306D and 306E retain present minimum required periods of employment for employees to be entitled to request flexible working arrangements.

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33 Ms Anna Chapman, *Transcript of Evidence*, 23 March 2012, p. 24.

34 Ms Susan Taylor and Ms Mary Reid, Carers Aust, *Transcript of Evidence*, 23 March 2012, p. 18.

35 Ms Genevieve Vaccaro, Ai Group, *Transcript of Evidence*, 23 March 2012, p. 4.

36 Job Watch, *Submission 10*, pp. 11-12.

37 Ms Genevieve Vaccaro, Ai Group, *Transcript of Evidence*, 23 March 2012, p. 3 and pp. 4-5. See also AFEI, *Submission 14*, p. 2.

38 Hon Julia Gillard MP, *House of Representatives Hansard*, 25 November 2008, p. 11190.

- 1.52 Many submitters called for these eligibility requirements to be shortened or removed.<sup>39</sup> For instance, the Work + Family Policy Roundtable commented that the requirement for 12 months of continuous service with an employer prior to requesting flexible working arrangements disadvantages already vulnerable employees who may have patchy work history due to caring responsibilities.<sup>40</sup>
- 1.53 The Women and Work Research Group suggested that the eligibility requirement be shortened to six months,<sup>41</sup> while Ms Anna Chapman, the Work + Family Policy Roundtable, Job Watch and the National Working Women's Centres called for the abolition of these eligibility requirements.<sup>42</sup> Job Watch argued that the right to request flexible working arrangements:
- does not relate to something such as unfair dismissal where the employer needs some time to work out whether the employees is suitable ... It is not something that compensates an employee for their length of service. Emergencies and illnesses happen out of the blue...<sup>43</sup>
- 1.54 Eligibility to access flexible working arrangements has been the subject of recent reviews that are presently under consideration by the Government. Furthermore, this matter is under active consideration as part of a series of further reviews. The Committee looks forward to the Government's response to these reviews where any proposal to change flexible working arrangements provisions will be provided within the context of more comprehensive and systematic changes to the workplace relations system.

## Concluding comments

- 1.55 The Committee notes the Government's commitment to review flexible working arrangements, particularly in relation to the right to request for people with responsibility for the care of another person, and endorses the

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39 For instance, Carers Queensland, *Submission 1*, p. 6; Women and Work Research Group, *Submission 8*, p. 7; Centre for Work + Life, *Submission 9*, p. 3; Job Watch, *Submission 10*, p. 7; Work + Family Policy Roundtable, *Submission 11*, p. 4.

40 Work + Family Policy Roundtable, *Submission 11*, p. 4.

41 Women and Work Research Group, *Submission 8*, p. 7.

42 Ms Anna Chapman, *Transcript of Evidence*, 23 March 2012, p. 21; Assoc Prof Sara Charlesworth, Work + Family Policy Roundtable, *Transcript of Evidence*, 23 March 2012, p. 21; Mr Ian Scott, Job Watch, *Transcript of Evidence*, 23 March 2012, p. 28; Ms Sandra Dann, Working Women's Centre SA, *Transcript of Evidence*, 23 March 2012, p. 29.

43 Mr Ian Scott, Job Watch, *Transcript of Evidence*, 23 March 2012, p. 28.

National Carer Recognition Framework and the consultations DEEWR is currently holding under the National Carer Strategy.

- 1.56 The majority of the Committee also supports the principle embodied in the Bill that the right to request flexible working arrangements should be extended to classes of employees other than carers, particularly those affected by domestic and family violence.
- 1.57 Most evidence to the inquiry supported the proposed extension of the right to request flexible working arrangements to broader categories of carers and other employees. However, concerns were expressed about the other aspects of the Bill. Perhaps, the most emphatic of these was the proposed removal of flexible working arrangements from the NES. There appears little merit in removing flexible working arrangement provisions from the NES.
- 1.58 The Committee is also concerned that by proposing that Fair Work Australia be able to impose flexible working arrangements orders, the Bill would alter the objectives of the workplace relations system as provided by the *Fair Work Act 2009*. It would be inappropriate to recommend a change that would alter the fundamentals of Australia's industrial relations framework without extensive and transparent consultation especially where other, more comprehensive reviews, are due to report to Government shortly or where recent reports are under active consideration.
- 1.59 The Committee notes the review of the *Fair Work Act*, and other reviews that have considered flexible working arrangements as well as the policies that will inform the Government's comprehensive response to these reviews. Subject to the above comments, the majority of the Committee supports the general principle of people having greater rights to request flexible working arrangements, but recommends that the Bill be considered after the Independent Review of the Act has been completed and the Government's response has been released.

**Recommendation 1**

**In light of the Independent Review of the *Fair Work Act 2009* currently underway, the Committee recommends the Bill be considered after the Independent Review of the Act has been completed and the Government's response has been released.**

**Amanda Rishworth MP**

**Chair**